FILED
No. (1) 061010 JAN 22 2007
IN THE OFFICE OF THE CLERK

Supreme Court of the United States

NIAGARA MOHAWK POWER CORPORATION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Court of Appeals erred in concluding, with no analysis of the applicable statute, that the Federal Energy Regulatory Commission ("FERC") has jurisdiction to prescribe terms and conditions for retail sales and local distribution service which this Court has found the Federal Power Act ("Act") reserves to the exclusive jurisdiction of the States in *New York v. FERC*, 535 U.S. 1, 23-24 (2002).

(2) Whether the Court of Appeals erred in failing to vacate and remand to FERC upon that Court's determination that FERC had failed to articulate a clear basis for its assertion of statutory jurisdiction to regulate the measurement of electricity sold and distributed to retail customers under tariffs filed with and approved by the State regulatory authority.

(3) Whether the Court of Appeals' decision violates Section 212(h) of the Act, 16 U.S.C. § 824k(h), by allowing FERC to mandate retail transmission service under terms and conditions different from those agreed to by transmission owners and set forth in the applicable tariff on file with FERC.

PARTIES TO THE PROCEEDING

The list of parties before the Court of Appeals is set forth in Petitioners' Appendix ("Pet. App.") O at 302a-303a. A glossary of terms is included in Pet. App. N at 296a-301a.

Petitioners are Central Hudson Gas & Electric Corporation ("CHGE"), Consolidated Edison Company of New York, Inc. ("Con Edison"), New York State Electric & Gas Corporation ("NYSEG"), Niagara Mohawk Power Corporation ("Niagara Mohawk"), Orange and Rockland Utilities, Inc. ("O&R"), and Rochester Gas and Electric Corporation ("RG&E"). Petitioners are all owners of the transmission grid operated by the New York Independent System Operator, Inc. ("NYISO"). Petitioners also have State tariffs governing the sale and local distribution of station power. Pursuant to Rule 29.6 of this Court's Rules, Petitioners' corporate disclosure statements are set forth below.

CHGE is a corporation created and organized under the laws of the State of New York, with its principal offices in Poughkeepsie, New York. CHGE is a wholly-owned subsidiary of CH Energy Group, Inc. CHGE is an electric and natural gas utility engaged in, among other things, the businesses of transmitting and distributing electric power to wholesale and retail customers, and distributing natural gas to retail customers.

Con Edison is a regulated public utility, incorporated in the State of New York, having its principal offices in New York, New York. Con Edison is engaged in the generation, transmission, distribution and wholesale and retail sale of electric power; the generation, distribution and retail sale of steam; and the retail sale of natural gas. Con Edison is a subsidiary of Consolidated Edison, Inc. No other publicly held company has a 10-percent or greater ownership interest in Con Edison. Con Edison is affiliated with O&R.

Niagara Mohawk is a regulated public utility incorporated in the State of New York with its principal offices in Syracuse, New York. Niagara Mohawk is engaged in the transmission, distribution, and wholesale and retail sale of electric power and energy, and the distribution and retail sale of natural gas. Niagara Mohawk is an indirect wholly-owned subsidiary of National Grid plc, a publicly held company.

NYSEG is a gas and electric corporation, duly organized and existing under the Transportation Corporations Law of the State of New York and has its principal place of business in Binghamton, New York. NYSEG is a wholly-owned subsidiary of Energy East Corporation.

O&R is a regulated public utility, operating in Orange, Rockland and part of Sullivan counties in New York State and in parts of Pennsylvania and New Jersey. O&R is engaged in the transmission, distribution and wholesale and retail sale of electric power and gas. O&R is a subsidiary of Consolidated Edison, Inc. No other publicly held company has a 10-percent or greater ownership interest in O&R.

RG&E is a gas and electric corporation, duly organized, existing, and authorized to do business under the Transportation Corporations Law of the State of New York, with its principal office in the City of Rochester, New York. RG&E is a wholly-owned subsidiary of RGS Energy Group, Inc., which is a wholly-owned subsidiary of Energy East Corporation.

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NIAGARA MOHAWK POWER CORPORATION, *et al.*,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners Central Hudson Gas & Electric Corporation, Consolidated Edison Company of New York, Inc., New York State Electric & Gas Corporation, Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc., and Rochester Gas and Electric Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") which allows FERC to assert jurisdiction over matters reserved exclusively to the States in direct violation of the Act and this Court's rulings in *New York v. FERC*, 535 U.S. 1 (2002).

OPINIONS BELOW

The Opinion of the Court of Appeals is reprinted in Petitioners' Appendix ("Pet. App.") A at 1a-13a and is pub-

lished at *Niagara Mohawk Power Corp. v. FERC*, 452 F.3d 822 (D.C. Cir. 2006) ("June 23 Opinion"). The Court of Appeals' orders inviting responses from Respondent FERC and Intervenors for Respondent to the petitions for rehearing and rehearing *en banc* and the orders denying those petitions (Pet. App. B at 13a-15a and C at 16a-19a) are not officially reported.

Petitioners sought review by the Court of Appeals of eight Orders issued by FERC in four proceedings, approving and applying a tariff filed by the NYISO. FERC's Orders were issued under Sections 205 and 206 of the Act, 16 U.S.C. §§ 824d, 824e. (Pet. App. L at 252a-260a.) FERC's Orders under review include: *KeySpan-Ravenswood v. New York Independent System Operator, Inc.*, FERC Docket No. EL01-50, 101 FERC ¶ 61,230 (Nov. 22, 2002) ("*KeySpan III*") (Pet. App. D at 20a-32a), *order on reh'g*, 107 FERC ¶ 61,142 (May 10, 2004) ("*KeySpan IV*") (Pet. App. E at 33a-69a); *Nine Mile Nuclear Point Station, LLC v. Niagara Mohawk Power Corp.*, FERC Docket No. EL03-234, 105 FERC ¶ 61,336 (Dec. 23, 2003) ("*Nine Mile I*") (Pet. App. H at 138a-159a), *order on reh'g*, 110 FERC ¶ 61,033 (Jan. 21, 2005) ("*Nine Mile II*") (Pet. App. I at 160a-194a); *AES Somerset, LLC v. Niagara Mohawk Power Corp.*, FERC Docket No. EL03-204, 105 FERC ¶ 61,337 (Dec. 23, 2003) ("*AES Somerset I*") (Pet. App. F at 70a-95a), *order on reh'g*, 110 FERC ¶ 61,032 (Jan. 21, 2005) ("*AES Somerset II*") (Pet. App. G at 96a-137a); and *Niagara Mohawk Power Corp. v. Huntley Power LLC*, FERC Docket No. EL03-27, 109 FERC ¶ 61,169 (Nov. 19, 2004) ("*Huntley I*") (Pet. App. J at 195a-219a), *order on reh'g*, 111 FERC ¶ 61,120 (Apr. 22, 2005) ("*Huntley II*"). (Pet. App. K at 220a-247a.) FERC denied timely requests for rehearing in the first proceeding on May 10, 2004; in the second and third proceedings on January 21, 2005; and in the fourth proceeding on April 22, 2005.

JURISDICTION

The June 23 Opinion and judgment of the Court of Appeals were entered on June 23, 2006. (Pet. App. A at 1a-13a.) On August 4, 2006, Petitioners filed a timely petition for rehearing and rehearing *en banc*. A separate petition for rehearing and rehearing *en banc* was submitted by the People of the State of New York and the Public Service Commission of the State of New York ("NYPSC"). On August 11, 2006, the Court of Appeals invited Respondent FERC and Intervenors for Respondent to file responses to the petitions. On October 23, 2006, the Court of Appeals denied the petitions for rehearing and for rehearing *en banc*. (Pet. App. B at 13a-15a and C at 16a-19a.) Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 201, 205, 206, 211, 212, 213 and 313 of the Act, 16 U.S.C. §§ 824, 824d, 824e, 824j, 824k, 824*l* and 825*l*, are reprinted in Pet. App. L at 248a-278a.

STATEMENT OF THE CASE

Petitioners are public utilities in New York that own transmission and local distribution facilities used for the transmission of wholesale electric energy, subject to FERC jurisdiction, and for local distribution, subject to NYPSC jurisdiction. Petitioners have retail tariffs governing local distribution services and retail power sales, including sales of station power, on file with the NYPSC.

In response to federal and state restructuring initiatives in 1996, including the issuance of Order No. 888[1] affirmed by

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[1] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, "Order No. 888," 1991-1996 FERC Stats. & Regs., Regs. Preambles ¶ 31,036 (1996),

this Court in *New York v. FERC*, Petitioners sold virtually all of their generating facilities to new owners, including the merchant generators in the proceedings below. With respect to their bulk power transmission facilities, in late 1999 Petitioners transferred operational control to the NYISO, a not-for-profit independent transmission system operator. The NYISO is responsible for scheduling all transmission services pursuant to its FERC-approved open access, non-discriminatory transmission tariff ("OATT") (excerpts in Pet. App. R at 321a-329a) and also administers competitive wholesale markets for energy and other services pursuant to its FERC-approved market administration and control area services tariff ("Services Tariff"). (Excerpts in Pet. App. S at 330a-337a.) Part IV of the FERC-approved NYISO OATT requires that retail sales and retail transmission services be provided pursuant to the State-approved tariff. (Pet. App. R at 321a-329a); *See KeySpan III* at P 10. (Pet. App. D at 23a-24a.); *See also KeySpan IV* at P 47. (Pet. App. E at 59a).

As of April 2003, the NYISO filed and the FERC approved a tariff that allowed generators to self-supply and net their station power against their output. *See KeySpan III.* (Pet. App. D at 20a-32a.) The tariff applied netting on a monthly basis: if a generator's output exceeded its consumption over a month, the tariff waived transmission charges for the station power that was delivered. *Id.* at P 8. (Pet. App. D at 22a-23a.) The NYISO regards the station power as consumption that is priced and sold on an hourly basis, and it offsets the charges against its monthly payment to the generator for output sold into the market. *Id.*

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order on reh'g, "Order No. 888-A," 1996-2000 FERC Stats. & Regs., Regs. Preambles ¶ 31,048, *order on reh'g*, "Order No. 888-B," 81 FERC ¶ 61,248 (1997), *order on reh'g*, "Order No. 888-C," 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

FERC approved the NYISO tariff but expanded its effect to State-jurisdictional standby services. If a generator had a net-positive electrical output over a month, FERC agreed with the NYISO that transmission charges should be waived. *Id.* But FERC also applied monthly netting as a basis for ruling that no State-jurisdictional power sale or local distribution service was rendered. *Id.* at P 21 (Pet. App. D at 27a.) FERC further ruled that no State-jurisdictional delivery service occurred if a delivery was made at transmission-level voltage. *Id.* at PP 20-21 (Pet. App. D at 26a-27a.); *Nine Mile I* at P 29 (Pet. App. H at 153a).

The NYPSC has approved tariffs for stand-by service, including services rendered at the transmission service level, that specify the measurement period for retail sales and local distribution service. FERC claims that its ruling preempts the NYPSC determinations and thereby prevents the NYPSC from regulating retail sales and retail access service under State law. *See KeySpan IV* at P 43. (Pet. App. E at 56a.)

In the decision below, the Court of Appeals held that FERC failed to explain how the Act authorized its assertion of jurisdiction over the regulation of retail services to end-use customers. 452 F.3d at 828. (Pet. App. A at 9a.) Nonetheless, the Court of Appeals affirmed FERC rulings which purport to declare that a generator may ignore State-approved charges for retail sales and purchases of station power and related local distribution services. *Id.* at 823-24, 830. (Pet. App. A at 1a-2a, 13a.) It did so on the ground that Petitioners and the State did not object to the imposition of hourly netting for FERC jurisdictional transmission, and that such acceptance negated the State's exclusive jurisdiction to prescribe the period for netting of retail sales and local distribution of station power. *Id.* at 828. (Pet. App. A at 9a-10a.)

The decision below allows FERC to interfere with the State's exclusive jurisdiction over retail sales, and local distribution of electricity used by generators for station power.

Surprisingly, the Court of Appeals reached that result without even discussing FERC's statutory authority to determine whether retail sales or local distribution services are taking place or whether related retail charges are lawful. (Pet. App. L at 248a-251a.) Moreover, the Court of Appeals also did not address whether Section 212(h) of the Act prohibits FERC from mandating retail transmission to an end-use customer under the circumstances presented here. (Pet. App. L at 269a-270a.)

The decision below fails to justify or even explain its ruling on this threshold jurisdictional issue and fails to address in any respect this Court's holdings in *New York v. FERC* that are directly on point. In *New York v. FERC*, this Court expressly held that "New York retains jurisdiction of the ultimate sale of the *energy* . . . FERC has recognized that the States retain significant control over local matters", including local distribution services. *New York v. FERC*, 535 U.S. at 23-24 (emphasis in original). The decision below rests on the erroneous conclusion that Petitioners could cede statutory jurisdiction to FERC.

A. Definition and Regulation of Station Power

While merchant generators[2] engage in wholesale sales of energy, they require station power to operate their generating facilities. Station power is the electric energy used to operate electric equipment and to meet the heating, lighting, air-conditioning, and office equipment needs of the buildings on a generating facility's site. *KeySpan I* at 61,677. (Pet. App. P at 305a.) Station power is consumed for end-use. FERC

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[2] FERC defines "merchant generator" to mean "a non-vertically integrated owner of generating facilities . . . [including] either an independent power producer or an affiliated power producer." *PJM Interconnection, L.L.C.*, 94 FERC ¶ 61,251 at 61,883 n.12 ("*PJM II*"), *reh'g denied*, 95 FERC ¶ 61,333 (2001) ("*PJM III*"), *order on reh'g*, 95 FERC ¶ 61,470 (2001) ("*PJM IV*") (collectively, "*PJM*").

accordingly conceded that, regardless of whether station power is self-supplied by a generator or it is purchased from a third-party through a retail sale, no wholesale sale subject to FERC's jurisdiction occurs. *KeySpan II* at P 2 (Pet. App. Q at 315a); *see also* FERC Response to Petitioners' Request for Rehearing at 3 (Pet. App. U at 342a); *see also* 452 F.3d at 828. (Pet. App. A at 9a.)

Station power supplied from off-site sources (whether purchased from a third-party or self-supplied from *remote* resources owned by the generator) must be delivered to the generator over the utilities' facilities. *PJM III* at 62,186.

FERC recognized in Order No. 888 that whenever an end-use customer receives the unbundled transmission of electricity, the transaction has two components for jurisdictional purposes – a transmission component and a local distribution component. The former is subject to regulation by FERC under the Act, and the latter is subject to regulation by the State. Order No. 888 at 31,784. FERC has held that the "delivery of station power (self-supply or otherwise) over local distribution facilities, and the tariffs and rates for such services, would be subject to regulation by the appropriate state regulatory authority." *KeySpan II* at P 7 n.11. (Pet. App. Q at 317a.); *KeySpan III* at P 10. (Pet. App. D at 23a-24a.)

FERC had occasion to consider its station power policies in New York when KeySpan-Ravenswood, Inc. ("KeySpan"), a merchant generator with generating facilities in New York, filed a complaint and an amended complaint under Section 206 of the Act (Pet. App. L at 256a-260a) requesting that FERC direct NYISO to revise its Services Tariff to adopt the Pennsylvania-New Jersey-Maryland Interconnection, LLC ("PJM") monthly station power netting policy with respect to the transmission of station power in interstate commerce. *KeySpan I* at 61,676-77. (Pet. App. P at 304a, 306a-307a.) In an order not at issue here, FERC found that NYISO's station power policy should be in the tariff rather

than in a technical bulletin, but rejected KeySpan's request that NYISO adopt PJM's station power policy. *Id.* at 61,679-80. (Pet. App. P at 312a-313a.) FERC recognized that "much of the delivery of station power to KeySpan and like generators in the NYISO service area would be by means of local distribution subject to state regulation." *Id.* at 61,679. (Pet. App. P at 312a.) FERC also recognized that it could be measured over a different period. *See id.* at 61,679-80. (Pet. App. P at 313a.)

B. FERC's Decisions Under Review

In the cases below, Petitioners sought review of eight Orders in four proceedings regarding FERC's failure to respect New York's authority to regulate the retail sale and local distribution of station power.

The first proceeding involved the formal incorporation of station power rules in the NYISO's tariff in response to FERC's order in *KeySpan II*. *See KeySpan III*. (Pet. App. D at 20a-32a.) The NYISO adopted a new station power policy, which included the "monthly netting" provision that NYISO had previously opposed and which FERC had ruled it was not required to adopt. The NYISO's policy extended monthly netting to retail sales and local distribution. FERC accepted the NYISO's "compliance filing." *KeySpan III*. (Pet. App. D at 31a.) FERC denied requests for rehearing including those of Petitioners. *KeySpan IV*. (Pet. App. E at 33a-69a.)

While the *KeySpan* cases were pending, three other proceedings under review began. Niagara Mohawk filed a complaint requesting FERC to clarify the NYISO station service rules to facilitate resolution of a lawsuit it had instituted regarding *State station service charges* due it under Niagara Mohawk's *State tariff* from generators Huntley Power LLC, NRG Huntley Operations, Inc., Dunkirk Power LLC, NRG Dunkirk Operations, Inc., Oswego Harbor Power LLC, and NRG Oswego Operations, Inc. FERC denied Niagara

Mohawk's complaint, *Huntley I* (Pet. App. J at 195a-219a), and denied the rehearing requests of Niagara Mohawk and Northeast Utilities Service Company ("NUSCO"). *Huntley II*. (Pet. App. K at 220a-247a.)

A generator, AES Somerset, LLC ("AES"), asked FERC to order Niagara Mohawk to cease submitting bills for certain station service charges under a *State tariff*, and declare past *State station service charges* unlawful. FERC granted the complaint, *AES Somerset I* (Pet. App. F at 70a-95a), and denied the rehearing requests of Niagara Mohawk, the other New York Transmission Owners (including Petitioners) ("NYTOs"), NUSCO, and the NYPSC. *AES Somerset II*. (Pet. App. G at 96a-137a.)

Finally, another generator, Nine Mile Point Nuclear Station LLC, filed a similar complaint requesting that FERC order Niagara Mohawk to cease submitting bills for *State station service charges* pursuant to a *State tariff*. FERC granted the complaint, *Nine Mile I* (Pet. App. H at 138a-159a), and denied rehearing requests of Niagara Mohawk, the other NYTOs, NUSCO and the NYPSC. *Nine Mile II*. (Pet. App. I at 160a-194a.)

In accepting the NYISO compliance filing and ruling on the complaints, FERC held that the generators did not need to comply with the NYPSC-approved tariffs for the sale and local distribution of station power. Although no wholesale sales were at issue, FERC asserted, without explanation, its authority to determine whether station power was being self-supplied or purchased at retail – two admittedly non-FERC jurisdictional activities. FERC also held, contrary to its rulings in Order No. 888, that no local distribution service took place because there were no "identifiable" local distribution facilities involved. Here again, FERC asserted, without explanation, its authority to determine whether local distribution facilities or services existed. FERC thus regulated and prescribed a critical term of the retail electricity

sales and local distribution services: the extent to which retail services are provided and consumed and the measurement of those retail services. Thus, FERC supplanted the NYPSC's regulation of the sale and local distribution of electricity consumed by generators, which the NYPSC had exercised by accepting the State-jurisdictional retail tariffs that FERC, by its rulings in the cases under review here, told generators they could ignore. FERC bootstrapped its jurisdiction to regulate the netting period and other terms of interstate transmission service to prescribe the same netting period for retail sales and local distribution service. FERC nowhere explained the source of its jurisdiction to regulate a utility's retail sale or distribution of station power. FERC also did not explain how it could find that no sale or local distribution of station power took place when it simultaneously recognized that those sales *did* take place by requiring each generator to pay for the *energy* it received in the market operated by the NYISO in *any hour* that its station power consumption exceeded its output. 452 F.3d at 828, 829 & n.8. (Pet. App. A at 9a, 11a.)

C. The Court of Appeals' Opinion

In the June 23 Opinion, the Court of Appeals affirmed all aspects of the eight FERC Orders under review, notwithstanding FERC's interference with State jurisdiction over retail sales of, and local distribution services for, end-use station power and the Act's clear reservation of the State's authority over retail sales and local distribution services. (Pet. App. A at 1a-13a.) The Court of Appeals upheld those Orders despite its findings that Petitioners' statutory arguments were "not insubstantial," that FERC's jurisdictional rationale was "a bit confusing," and that FERC had not clearly articulated why its limited statutory jurisdiction permits it to determine that no sale of any kind – including a retail sale – takes place when the generator takes station power from the grid. 452 F.3d at 828. (Pet. App. A at 9a.)

Even though it concluded that FERC had failed to justify its assertion of jurisdiction, the Court of Appeals did not remand the Orders to the agency for it to address the jurisdictional issue in the first instance. Nor did the Court of Appeals itself analyze the text, history, or purpose of the Act to determine whether Congress conferred authority upon FERC to act as it did, or take into account this Court's interpretation of the Act or Order No. 888 in *New York v. FERC*. Rather, the Court of Appeals upheld those Orders based on a perceived concession of jurisdiction by Petitioners. *Id.* at 828. (Pet. App. A at 9a.) Petitioners in fact did not concede jurisdiction, nor could such a concession confer statutory jurisdiction on the agency in any event.

REASONS FOR GRANTING THE WRIT

The decision below allows FERC to exercise authority not vested by statute and to unlawfully limit the exercise by state agencies of their exclusive regulatory authority granted by state statutes, both in contravention of this Court's decision in *New York v. FERC*. The effect of that decision would be to burden utilities, and ultimately consumers, with hundreds of millions of dollars of costs that generators are obligated to bear under state law in New York alone. The decision below authorizes a significant expansion of FERC's authority, beyond the authority vested by Section 201 of the Act, 16 U.S.C. § 824. (Pet. App. L at 248a-251a.)

In *New York v. FERC*, this Court held that FERC's jurisdiction over rates for electricity sales and deliveries extends only to (a) wholesale sales, and (b) transmission in interstate commerce, including unbundled transmission to retail customers under certain circumstances. In the same decision, this Court held that the states have *exclusive* statutory jurisdiction over the rates for (a) retail sales, and (b) the local distribution of electricity to retail customers.

The Court of Appeals' June 23 Opinion allows FERC to regulate retail sales of electricity and local deliveries of electricity, and to supplant the State's regulation of those retail services by authorizing generators to ignore State tariffs. It does so without even addressing the relevant provisions of the Act or this Court's relevant holding in *New York v. FERC*, 535 U.S. at 23-24, that FERC may not interfere with jurisdiction exclusively reserved by Congress for the states. *Id.* at 17-18. Although the June 23 Opinion found that FERC had not articulated any authority grounded in the Act to support its attempt to determine whether State-jurisdictional retail sales or local distribution of station power occur; the Court of Appeals nevertheless failed either (a) to remand to FERC for the missing explanation; or (b) to provide any jurisdictional analysis of its own. (Pet. App. A at 1a-13a.) The Court of Appeals also failed to address Petitioners' argument that FERC's station power Orders violate the explicit statutory limitation imposed by Section 212(h) of the Act that FERC cannot mandate retail wheeling to end-use customers (Pet. App. L at 269a), particularly given that Part IV of the FERC-approved NYISO tariff (Pet. App. R at 321a-329a) obligates generators to comply with the applicable State tariffs. For all of these reasons, the June 23 Opinion and judgment should be reversed and the cases remanded with instructions either to remand to FERC for a clear explanation of the statutory basis for its claimed authority, because the Court of Appeals found that FERC had not articulated such a basis, or to follow this Court's holdings in *New York v. FERC* (which the Court of Appeals ignored).

The June 23 Opinion is significant because it interferes with the regulation by every state of the retail sale and local distribution of electricity used by generators for station power, matters exclusively reserved to the states by Congress. Moreover, it obscures the lines between federal and state jurisdiction, adversely affecting other pending station power

appeals and many other proceedings involving regulation of the nation's electricity industry. The disruptive effects of such a holding can only be prevented by granting the writ.

ARGUMENT

THE COURT OF APPEALS ERRED IN AFFIRMING FERC'S INTERFERENCE WITH STATE REGULATION OF MATTERS EXPRESSLY RESERVED BY CONGRESS TO THE STATES.

POINT I The June 23 Opinion Unlawfully Permits FERC to Regulate the Terms of Retail Services That Are Within the "Exclusive Jurisdiction" of the States.

The Court of Appeals' decision is in direct conflict with this Court's holdings in *New York v. FERC*. In *New York v. FERC*, this Court carefully analyzed the text of Section 201 of the Act (Pet. App. L at 248a-251a), and its associated legislative history, specifically with respect to the division of state and federal jurisdiction over sales and delivery services. It determined that Section 201 of the Act authorizes FERC to assert jurisdiction only over wholesale sales and transmission of electric energy in interstate commerce. 535 U.S. at 18-20. This Court also noted that Section 201(d) of the Act (Pet. App. L at 249a) provides that the "term 'sale of electric energy at wholesale,' when used in this subchapter, means a sale of electric energy to any person for resale." *Id.* at 19 n.12.

This Court also found that Section 201 of the Act (Pet. App. L at 248a-251a) unambiguously provides the States with exclusive jurisdiction over retail sales and local distribution. 535 U.S. at 21-22. And, it determined that Order No. 888 was consistent with the Act's preservation of state authority

over retail sales, local distribution facilities and local distribution services. This Court expressly held that:

> New York . . . correctly states that the legislative history [of the FPA] demonstrates Congress' interest in retaining state jurisdiction over retail sales. But again, FERC has carefully avoided assuming such jurisdiction, noting repeatedly that 'the FPA does not give the Commission jurisdiction over sales of electric energy at retail.' [Order No. 888 at 31,969] . . . New York retains jurisdiction of the ultimate sale of . . . *energy*.

New York v. FERC, 535 U.S. at 23 (emphasis in original); *see also* Act § 201(b), 16 U.S.C. § 824(b). (Pet. App. L at 248a-249a.)

Even with respect to unbundled retail transmission, the Court found that "FERC has recognized that the States retain significant control over local matters even when retail transmissions are unbundled." *New York v. FERC*, 535 U.S. at 24. In support, this Court quoted FERC's own representations that Order No. 888 would "'not affect or encroach upon state authority in such traditional areas as the authority over local service issues, including reliability of local service . . . and authority to impose nonbypassable distribution or retail stranded cost charges.'" *Id.* (internal citation omitted).[3]

FERC, too, has recognized that its "statement regarding state authority over the 'service' of delivering electric energy is intended to recognize the historical and local nature of delivering power to end-users and the states' legitimate concerns and responsibilities in regulating local matters." Order No. 888-A at 30,344-45. FERC "reiterate[d] that we believe there is always a local distribution service element of a retail transaction, through which the state may impose

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[3] This Court also quoted FERC's acknowledgement "'that recovery of legitimate stranded costs is critical to the successful transition of the electric industry. . . .'" *New York v. FERC*, 535 U.S. at 27 n.15 (internal citation omitted).

charges on the retail customer." Order No. 888-B at 62,098. In *New York v. FERC*, this Court affirmed FERC's pronouncements in Order No. 888 and its progeny.

Nevertheless, the Court of Appeals' decision allows FERC to intrude upon State authority by prescribing the period over which retail sales and local distribution services are measured, the facilities over which they must be rendered and the extent to which generators are subject to State-approved tariffs. The Court of Appeals identified no statutory basis for FERC's assertion of authority to regulate these critical aspects of retail electricity sales and local distribution service. The Court of Appeals' error is substantial and must be overturned to secure and maintain uniformity with the controlling precedent, as articulated in *New York v. FERC*, and to prevent federal encroachment on matters reserved by Congress to the exclusive jurisdiction of the states.

POINT II The Court of Appeals Erred by Affirming FERC's Assertion of Authority to Determine the Existence and Measurement of Activities Without Identifying Any Statutory Basis for Disregarding the State's Exclusive Statutory Jurisdiction Over Retail Sales.

The Court of Appeals erred when it affirmed eight FERC Orders in which FERC bootstrapped its regulatory authority over the *transmission* of station power[4] – which the Petitioners do not question – to oust the State of authority to regulate retail sales and the local distribution of station power.[5]

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[4] *See* FERC Response to Petitioners' Request for Rehearing at 3. (Pet. App. U at 342a-343a.) *See also id.* at 7 ("[a]ll the FERC did in the instant proceeding was to approve and enforce a FERC-filed transmission tariff . . . ."). (Pet. App. U at 342a.)

[5] Petitioners have maintained consistently that they are not challenging FERC's authority to regulate transmission services that are within its

Specifically, FERC, without explanation, asserted it could use its authority to determine the netting/measurement period for transmission to prescribe the same netting/measurement period for retail sales and local distribution. The Court of Appeals upheld those Orders despite its findings that Petitioners' statutory arguments were "not insubstantial," that FERC's jurisdictional rationale was "a bit confusing," and that FERC had not clearly articulated why its limited statutory jurisdiction permits it to determine that no sale of any kind – including a retail sale – takes place when the generator takes station power from the grid. 452 F.3d at 828. (Pet. App. A at 9a.) The Court of Appeals erred by allowing FERC to assert jurisdiction to regulate and to prescribe critical terms of the retail electricity sales and local distribution services – the extent to which retail services are taking place and the measurement of those retail services – without undertaking any analysis of whether FERC had adequately articulated such a rationale, or whether the Act empowers FERC to do so. *Id.* at 828-29 & n.8. (Pet. App. A at 9a, 11a.)

The Court of Appeals should have vacated FERC's actions and remanded to FERC for a clear explanation of the statutory basis for its actions, as well as an explanation of FERC's inconsistent refusal to recognize the existence of State jurisdiction over hourly retail sales that it acknowledged for

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jurisdiction, including FERC's authority to establish netting periods applicable only to such transmission services. Rather, Petitioners only contest FERC's authority to infringe upon services that are within the exclusive jurisdiction of the State. *See* Protest of Niagara Mohawk Power Corp., FERC Docket No. EL01-50-002, at 20 (Oct. 11, 2002) ("Niagara Mohawk notes that the question of netting before the Commission extends only to transmission service for the delivery of station power. . . . [I]t is within the exclusive purview of the New York PSC to determine the appropriate netting period to employ to determine the rates payable by generators buying station service power for their own consumption or receiving local delivery service." (Pet. App. V at 344a.)

other purposes. As this Court has held, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 294 U.S. 499, 511 (1935), quoted with approval in *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). The Court of Appeals' failure to require the agency to reconcile its actions with its other, inconsistent interpretations of the Act, is similar to the actions of the Environmental Protection Agency, as recognized by the Court in its January 5, 2007 order granting the writ in *National Ass'n of Home Builders v. Defenders of Wildlife; and EPA v. Defenders of Wildlife*, Case Nos. 06-340 and 06-549, 75 U.S.L.W. 3349 (Jan. 5, 2007). There, this Court *sua sponte* requested the parties to brief and argue the question of whether the Court of Appeals should have remanded the actions to the agency for further proceedings under similar circumstances.

If it did not remand the Orders to FERC, the Court of Appeals should have undertaken its own analysis of whether the Act empowered FERC to regulate and to prescribe critical terms of the retail electricity sales and local distribution services -- the extent to which retail services are taking place and the measurement of those retail services. The Court of Appeals violated this Court's oft-repeated admonition that a reviewing court is "require[d] . . . to be certain that Congress has conferred authority on the agency." *New York v. FERC*, 535 U.S. at 18. The starting point of the analysis is always the statute:

> [In] defining the proper scope of the federal power. . . we must interpret the statute to determine whether Congress has given FERC the power to act as it has, and we do so without any presumption one way or the other.

Id. Analysis of the jurisdiction conferred by the agency's organic statute is critical because "an agency literally has no power to act, let alone pre-empt, the validly enacted legisla-

tion of a sovereign State, unless and until Congress confers power" on it. *Id.* (citations omitted); *accord, e.g., La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Stark v. Wickard*, 321 U.S. 288, 309 (1944) (it is axiomatic that an administrative agency, a creature of the legislature, cannot exceed its statutory authority).

With the Court of Appeals' approval, FERC declared that generators could ignore charges approved by the NYPSC for inclusion in Petitioners' retail tariffs for the sale or local distribution of station power service. *See AES Somerset I* and *II* (Pet. App. F at 70a-95a and G at 96a-137a); *Nine Mile I* and *II* (Pet. App. H at 138a-159a and I at 160a-194a). FERC held that those services must be measured using its monthly netting approach and, on that basis, found that no retail sales or local distribution services subject to the State-approved tariffs took place. *Id.*; *see also KeySpan II* at P 2. (Pet. App. Q at 315a.) FERC also declared that no local distribution service occurred because there were no identifiable local distribution facilities involved. *See AES Somerset I* and *II* (Pet. App. F at 92a and G at 101a-103a); *Nine Mile I* and *II* (Pet. App. H at 155a and I at 183a).

Neither the Court of Appeals nor FERC answered, nor did either even consider, the critical jurisdictional question: Does FERC have the statutory jurisdiction to mandate the use of monthly netting to determine how much power is sold and locally distributed to retail customers? The only conceivable basis for FERC jurisdiction is its authority under the Act to regulate wholesale sales and interstate transmission service, 16 U.S.C. § 824 (Pet. App. L at 248a-251a), but both the Court of Appeals and FERC agree that no wholesale sales are at issue. FERC Response to Petitioners' Request for Rehearing at 3 (Pet. App. U at 342a); *see also* 452 F.3d at 828. (Pet. App. A at 9a.) FERC also admits that it has no jurisdiction under the Act over self-supply or third-party sales of station power, or over the local distribution of station power.

KeySpan II at P 2 (Pet. App. Q at 315a); *KeySpan III* at P 20 (Pet. App. D at 26a-27a); *KeySpan IV* at P 47. (Pet. App. E at 59a.)

Neither FERC nor the Court of Appeals explained how FERC's jurisdiction over transmission allows FERC to regulate the self-supply, retail sale, or local distribution of station power. Nevertheless, the Court of Appeals affirmed FERC's assertion of authority to determine whether station power was being self-supplied or purchased at retail and locally distributed – even though FERC has admitted it has no statutory jurisdiction over any of these activities. The question is not whether the charges for these services should be assessed based on amounts consumed over a period of a month, an hour, or some other period, but, rather, which agency has the statutory jurisdiction to make that determination. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. at 374. Neither FERC nor the Court of Appeals identified any statutory basis for FERC to exercise that jurisdiction and to preempt the NYPSC from doing so.

To evade State jurisdiction, FERC narrowly defined local distribution facilities to include only "identifiable" facilities, departing from its rulings in Order No. 888 and other judicial precedent where it recognized the authority of the states to regulate local distribution services. Order No. 888 at 30,344-45; Order No. 888-B at 62,098. Specifically, FERC found that no local distribution takes place where no "identifiable" local distribution facilities are involved.[6] FERC made this

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[6] *Cf. New York v. FERC*, 535 U.S. 1. *See also Detroit Edison Co. v. FERC*, 334 F.3d 48, 51 (D.C. Cir. 2003), wherein the Court of Appeals specifically noted Order No. 888's ruling that "states have jurisdiction over local distribution 'service' – i.e., the service of delivering electricity to end-users – even 'where there are no identifiable local distribution facilities.'" *Id.* (quoting Order No. 888 at 31,783). The Court of Appeals also recognized the purpose of this ruling was to ensure "state utilities

determination without consideration of the State's determination as to the facilities involved. FERC failed to conduct its seven-factor test regarding the nature of the facilities. *See* Order No. 888 at 31,781, 31,783, 31,967. FERC did not take into consideration that "paper facilities" or meters are encompassed within the term local distribution facilities.[7] Moreover, FERC found that no local distribution service occurs unless a sale occurs. *See KeySpan III* at P 10. (Pet. App. D at 23a-24a.) *See also* 452 F.3d at 830 (Pet. App. A at 12a-13a) Yet, FERC offered no basis for its assertion of authority to determine whether local distribution facilities or services existed. The Court of Appeals failed to require FERC to clearly articulate its policy where retail sales are involved, and to explain the inconsistencies in its actions under review with its policies articulated elsewhere, as well as to uphold the exclusive jurisdiction of the State over retail sales and local distribution service, as held by this Court in *New York v. FERC*. By affirming FERC's actions to define what constitutes local distribution facilities, the Court of Appeals improperly allowed FERC to avoid the express limitations imposed by Section 201 of the Act and allowed the generators

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would be able to impose stranded costs charges through their jurisdiction over local distribution." *Id.*

[7] Paper facilities were expressly recognized under federal law as legitimate in *Hartford Electric Light Co. v. FPC*, 131 F.2d 953, 961 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943) (in examining Section 201 of the Act, the Court found that the term "facilities" is broad and includes so-called paper facilities, *i.e.*, contracts, memoranda, etc.). Such documents are sufficient to establish the Commission's jurisdiction under the Act and must be given equal effect with respect to state regulatory jurisdiction. *Id.* Other facilities also are utilized to render state-jurisdictional distribution service, such as meters which measure station power deliveries. *Id.* ("the word 'facilities' is generally regarded as a widely inclusive term, embracing anything which aids or makes easier the performance of the activities involved in the business of a person or corporation").

to evade local distribution service charges arising under the State tariffs. (Pet. App. L at 248a-251a.)

For these reasons, the Court of Appeals erred in allowing FERC to oust the NYPSC from its exclusive authority to regulate station power services, by declaring (in effect) that generators can evade applicable State tariffs for retail sales and local distribution of station power service through the transparent device relied on here. The law is clear that FERC must have statutory authority to act and may not preempt state authority in an area beyond "the scope of its congressionally delegated authority." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. at 374. Moreover, FERC cannot preempt state jurisdiction and preclude the proper exercise of state authority without an explanation as to how the state action conflicts with the exercise of FERC's authority. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Here, the Court of Appeals expressly acknowledged the lack of any such rationale.[8] (Pet. App. A at 9a, 11a.)

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[8] Indeed, the Court of Appeals also found that Petitioners' strongest argument was FERC's use of its *monthly transmission* netting policy to oust the State of its exclusive jurisdiction over retail sales was inconsistent with FERC's own recognition of *hourly* energy transactions. 452 F.2d at 830 ("The strongest point petitioners make is that one month is inconsistent with the hourly method by which actual power, as opposed to transmission costs, is priced. Pricing of electricity in New York is performed on an hourly basis."). (Pet. App. A at 12a.) FERC's use of a monthly netting policy to oust the State's jurisdiction over retail sales is inconsistent with FERC's statements that its monthly netting policy has no impact on FERC's own policy to regulate hourly energy transactions. 452 F.3d at 830 (Pet. App. A at 12a-13a); *KeySpan III* at P 8 (Pet. App. D at 22a-23a); *Accounting and Financial Reporting for Public Utilities Including RTOs*, 115 FERC ¶ 61,080 at P 16 (2006); NYISO Services Tariff at Sections 4.1.1 (Pet. App. at 330a.) and Attachment B Section 2.2 (Pet. App. S at 334a). The Court of Appeals also erred in accepting a *post hoc* rationale supplied by FERC counsel during oral argument that the hourly charge is merely an accounting entry rather than a sale of power.

POINT III The Court of Appeals Failed to Address the Limitations on FERC's Jurisdiction Under Section 212(h) of the Act.

In the cases below, Petitioners pointed to the limitations on FERC's jurisdiction under Section 212(h) of the Act (Pet. App. L at 269a-270a) as prohibiting FERC's assertion of jurisdiction here. (Pet. Br. 48-49; Pet. App. T at 338a-340a.) The Court of Appeals did not address this challenge to FERC's statutory authority. (*See* Pet. App. A at 1a-13a.)

Congress imposed specific restrictions upon FERC's jurisdiction with respect to retail transmission service under Section 212(h) of the Act, 16 U.S.C. § 824k(h). (Pet. App. L at 269a-270a.) Section 212(h) of the Act expressly prohibits FERC from mandating delivery "directly to an ultimate consumer" or "to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate consumer," except in situations clearly not applicable here. (Pet. App. L at 269a.) In Order No. 888, FERC acknowledged this statutory prohibition and the resulting limitation on FERC's statutory ratemaking jurisdiction in seeking to assure utilities and state regulators that it would not do what it has done in its orders that were the subject of the Court of Appeals' decision:

> In asserting jurisdiction over unbundled retail transmission in interstate commerce by public utilities, the Commission in no way is asserting jurisdiction to order retail transmission directly to an ultimate consumer.

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452 F.3d at 830 (Pet. App. A at 13a); Oral Tr. at 40 (Pet. App. M at 295a). Of course, such *post hoc* rationalization cannot justify the Orders under review. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983); *SEC v. Chenery Corp.*, 318 U.S. at 94-95. However, in any event, there is no conflict that would justify preemption, because FERC's monthly netting policy has no impact on its own recognition of hourly energy transactions.

> Section 212(h) of the FPA clearly prohibits us from doing so. . . .
>
> The Commission's assertion of jurisdiction is that if retail transmission in interstate commerce by a public utility *occurs voluntarily or as a result of a state retail wheeling program*, the Commission has exclusive jurisdiction over the rates, terms, and conditions of such transmission. . . .

Order No. 888 at 31,781 (emphasis added).

The NYISO tariffs and the enabling agreements were designed in accordance with Order No. 888 to accommodate retail access in recognition of the facts that FERC asserted jurisdiction over unbundled retail transmission service and that FERC deferred to the State regulators in the matter of designing retail access tariffs. In their filing to establish NYISO, the NYTOs emphasized that:

> It should be noted that the investor-owned Member Systems [the NYTOs], in outlining this structure, are relying on assurances made in Order [No.] 888 that *existing transmission-level retail customers* will not be able to evade distribution access charges.[9]

The NYTOs submitted Part IV of the NYISO OATT to expressly reflect the conditional availability of their transmission facilities to provide retail transmission service only to the extent that the State tariffs are complied with.[10] (Pet. App. R at 321a-329a.) Consistent with the statutory framework, the NYTOs provide retail transmission service only to

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[9] *Cent. Hudson Gas & Elec. Corp.*, FERC Docket Nos. ER97-1523, "Supplemental Filing To The Comprehensive Proposal To Restructure The New York Wholesale Electric Market," (Vol. I), at 56 n.37 (Dec. 19, 1997) (emphasis added). (Pet. App. W at 346a.)

[10] As discussed above, Part IV of the OATT requires that all retail transmission customers also pay charges under their utility's State-approved retail access tariff. (*See* Pet. App. R at 321a-329a.)

customers that take service under their State-jurisdictional retail access tariffs. Part IV of the FERC-approved NYISO OATT – which applies to *all* end-use customers (including generators consuming station power) in excess of one megawatt – provides that, either (i) station power is provided by the host utility, in which case the generator takes bundled sales and delivery service under the utility's state retail tariff; or (ii) the generator can become a retail access customer and acquire the station power from any source, including through the markets administered by NYISO, in which case the retail access customer must still pay State retail charges.[11] (Pet. App. R at 321a-329a.) FERC accepted this express condition when it approved the NYISO's OATT and, in particular, Part IV of the NYISO OATT. Part IV remains in effect today. (Pet. App. R at 321a-329a.) Accordingly, under the Act, the existence of a service under NYTOs' State-jurisdictional tariffs is the predicate for the use of the transmission facilities to provide unbundled retail transmission of station power.

In *PJM III*, FERC stated that, where a utility provides unbundled retail transmission of station power to a merchant-generator, and such service is provided under the federal tariff for retail transmission, "the appropriate 'retail delivery service tariffs' to be used in providing local distribution service [would be] a matter of a state regulatory authority to determine." 95 FERC at 62,185 (citation omitted).

Without explanation, the June 23 Opinion allowed FERC to assume jurisdiction over local deliveries without address-

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[11] It is significant that the NYISO-TOA expressly prohibits NYISO from amending these tariff provisions and reserves this right to the NYTOs. NYISO-TOA Sections 3.04, 3.10, 6.01, and 6.14. (Pet. App. X at 348a-357a. These provisions track those approved in *Atlantic City Electric Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002), *subsequent appeal*, 329 F.3d 856 (D.C. Cir. 2003) ("*Atlantic City*"), in which the Court held that Transmission Owners can: (1) reserve Section 205 filing rights; and (2) limit the Section 205 rights of the ISO. 295 F.3d at 9-12, 15.

ing the express limitation on open access imposed by the State statute: that the transmission facilities not be used for local deliveries to end-users absent compliance with the governing State tariffs. The Court of Appeals' failure to address Petitioners' argument that FERC's station power orders violate the explicit statutory limitation imposed by Section 212(h) of the Act (Pet. App. L at 269a-270a) and Part IV of the tariff (Pet. App. R at 321a-329a) regarding the provision of retail transmission service, is inexplicable. Section 212(h) of the Act (Pet. App. L at 269a-270a) prohibits FERC from asserting jurisdiction over deliveries directly to end-users, a limitation FERC recognized in Order No. 888.[12] While FERC recognizes that Section 212(h) of the Act (Pet. App. L at 269a-270a) precludes FERC from exercising jurisdiction over deliveries to end-users other than in conjunction with a state retail-access tariff, that is exactly what it has done here by preventing the State from exercising jurisdiction over deliveries to end-users except where FERC finds identifiable distribution facilities. Order No. 888 at 31,781, 31,783. In affirming FERC's Orders, the Court of Appeals allowed FERC to require Petitioners to transmit electric energy directly to end-users, contrary to the prohibition of Section 212(h) of the Act. (Pet. App. L at 269a-270a.)

POINT IV The Court of Appeals' Failure to Analyze FERC's Statutory Jurisdiction Cannot Be Justified on the Basis of a Claimed Concession.

As demonstrated in Point II, *supra*, the Court of Appeals failed to fulfill its obligation to ensure that FERC's assertion of preemptive authority to regulate the measurement period

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[12] *See also* Petitioners' discussion of the Section 212(h) violation in Petitioners' Brief at 48-49 (Pet. App. T at 338a-340a); and at oral argument in Tr. 9, lines 10-13; 17-20. (Pet. App. M at 284a.)

for the retail sale and local distribution of station power was adequately grounded in authority that Congress conferred upon the agency in the Act. *New York v. FERC*, 535 U.S. at 18.

The Court of Appeals sought to excuse this omission by relying on a perceived concession of jurisdiction by Petitioners. On this ground, the Court of Appeals dismissed Petitioners' jurisdictional argument (452 F.3d at 828 (Pet. App. A at 9a)), their Order No. 888 argument (*id.* at 829; Pet. App. A at 13a), and their filed-rate and rule-against-retroactive-ratemaking argument (*id.* at 830; Pet. App. A at 13a.) However, even if Petitioners had made such a concession, that would not resolve the jurisdictional issue: parties have no authority to confer statutory jurisdiction upon FERC, especially with respect to those matters as to which Congress vested exclusive jurisdiction with the State. *New York v. FERC*, 535 U.S. at 18; *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 924; *Plaquemines Port, Harbor & Terminal Dist. v. Fed. Mar. Comm'n*, 838 F.2d 536, 542 n.3 (D.C. Cir. 1988); *Am. Mail Line Ltd. v. Fed. Mar. Comm'n*, 503 F.2d 157, 170 (D.C. Cir. 1974).

In any event, there was no such concession of statutory jurisdiction. The Court of Appeals cited *KeySpan III* at 62,001 (Pet. App. D at 29a) in support of its conclusion that Petitioners conceded that hourly netting would not violate the Act. 452 F.3d at 828. (Pet. App. A at 9a.) However, *KeySpan III* does not support such a finding.[13] Indeed,

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[13] In *KeySpan III*, FERC rejected one of the Petitioners' arguments in favor of limiting hourly netting only to FERC-jurisdictional *transmission* service. (Pet. App. D at 29a.) Examination of the pleading to which FERC responded in *KeySpan III* clearly shows that, while the Petitioner supported hourly netting solely for *transmission* service, the Petitioner wholly opposed FERC's assertion of jurisdiction over retail sales and local distribution of station service. *See* Protest of Niagara Mohawk

KeySpan III clearly undermines the Court of Appeals' conclusion that Petitioners conceded FERC's statutory jurisdiction over the measurement of State-jurisdictional retail electricity sales and local distribution service.

Moreover, counsel's statement that Petitioners did not oppose hourly netting (cited by the Court of Appeals as a reaffirmation of this concession) was only a reference to FERC's ability to impose hourly netting for *transmission* service, not netting of retail sales or local distribution services. (Oral Argument Tr. 6, lines 2-5; Tr. 9, lines 4-5; 8-9; 10-13; 17-20.) (Pet. App. M at 281a-284a); 452 F.3d at 828. (Pet. App. A at 9a.) Counsel clearly stated that "the State is the appropriate party for determining over what period of time [a retail sale] should be measured." (Oral Argument Tr. 8, lines 14-16 (Pet. App. M at 283a); *see also id.*, Tr. 6, line 25 – Tr. 7, line 3). (Pet. App. M at 282a.)

Therefore, the Court of Appeals erred in concluding that the concession it believed Petitioners had made established FERC's statutory jurisdiction to determine the extent to which retail services exist and to prescribe how to measure retail sales and local distribution of station power.

Power Corp., FERC Docket No. EL01-50-002, at 20. (Pet. App. V at 344a.)

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.[14]

Respectfully submitted,

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[14] The Court of Appeals failed to recognize that, when it determined that FERC's rationale was (a) "a bit confusing", and (b) FERC had failed to articulate the basis for its claimed authority that its appellate counsel asserted *post hoc*, it should have remanded the cases to FERC for it to explain, clearly and in the first instance, what statutory authority FERC claimed to possess over the matters at issue. *See, e.g., National Ass'n of Home Builders v. Defenders of Wildlife; and EPA v. Defenders of Wildlife*, Case Nos. 06-340 and 06-549, 75 U.S.L.W. 3349 (Jan. 5, 2007) (adding issue to grant of writ to address whether the Court of Appeals should have remanded to the agency for it to address its statutory authority). In the circumstances, the Court may wish to grant the petition, summarily vacate the Court of Appeals' opinion and judgment, and remand to the Court of Appeals with instructions to remand to FERC for FERC to provide in the first instance its rationale for asserting jurisdiction before review is had on the merits of FERC's actions.

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